SUPREME COURT, U.S.
FILED
MAR 5
JOHN T. FEY, Clerk

No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
DONALD B. MacGUINEAS,
JOHN G. LAUGHLIN,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
1. Petitioner's separation from Government employment	3
2. Proceedings below	10
Summary of argument	14
Argument	16
I. The Secretary of State validly exercised the absolute discretion vested in him by Section 103 in terminating petitioner's employment	16
A. The termination of petitioner's employment by the Secretary of State, in the exercise of his absolute discretion, is unaffected by the Loyalty Review Board's lack of jurisdiction	19
B. Petitioner's removal under Section 103 was not in violation of any statutory or regulatory right	22
1. The statutory conditions otherwise applicable to employee removals were superseded by Section 103	22
2. Assuming their applicability, regulations promulgated by the Department of State with respect to employee-removal proceedings were complied with in petitioner's case	23
3. Neither the 1949 nor the 1951 regulations applied to petitioner's dismissal	28
II. The appointment and removal of Government employees is a matter of executive discretion which is subject to judicial review only for compliance with applicable statutes or regulations	35

Page

Conclusion 42
Appendix 43-66

CITATIONS

Cases:

Accardi v. *Shaughnessy*, 347 U. S. 260 ..... 21, 30, 31
Adams v. *Nagle*, 303 U. S. 532 37
Alaska Smokeless Coal Co. v. *Lane*, 250 U. S. 549 37
American Communications Assn. v. *Douds*, 339 U. S. 382 19
Bailey v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918 ..... 18, 37
Blackmon v. *Lee*, 205 F. 2d 13 36
Blum v. *United States*, 120 C. Cls. 232 37
Borak v. *Biddle*, 141 F. 2d 278, certiorari denied, 323 U. S. 738 38
Boylan v. *Quarles*, 235 F. 2d 834 36
Brown v. *Lane*, 232 U. S. 598 36
Bruner v. *United States*, 323 U. S. 142 31
Burnap v. *United States*, 252 U. S. 512 36
Butler v. *Pennsylvania*, 10 How. 402 38
Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23 31
Carrick v. *Lamar*, 116 U. S. 423 37
Chicago & S. Air Lines v. *Waterman Corp.*, 333 U. S. 103 ..... 18, 21, 36
Ciaffone v. *United States*, 126 C. Cls. 532 37
Cole v. *Young*, 351 U. S. 536 ..... 33, 41
Crenshaw v. *United States*, 134 U. S. 99 38
Croghan v. *United States*, 116 C. Cls. 577 37
Deak v. *Pace*, 185 F. 2d 997 38
Decatur v. *Paulding*, 14 Pet. 497 37
Devine v. *Campbell*, 194 F. 2d 876, certiorari denied, 344 U. S. 826 37
Dupre v. *United States*, 116 C. Cls. 660 37
Eberlein v. *United States*, 257 U. S. 82 ..... 20, 36 40, 41
Elchibegoff v. *United States*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694 38
Ellmore v. *Brucker*, 236 F. 2d 732, certiorari denied, December 17, 1956 36
Engelhardt v. *United States*, 125 C. Cls. 603 37
Gaines v. *Thompson*, 7 Wall. 347 37
Ginn v. *United States*, 110 C. Cls. 637 40

Cases—Continued

	Page
Green, A. Lincoln, v. Baughman, No. 13,500, decided January 31, 1957	36
Hall v. Payne, 254 U. S. 343	37
Hammond v. Hull, 131 F. 2d 23, certiorari denied, 318 U. S. 777	22
Hennen, Matter of, 13 Pet. 230	22, 36, 38
I. C. C. v. New York, N. H. & H. R. Co., 287 U. S. 178	37
Jay v. Boyd, 351 U. S. 345	20
Keim v. United States, 177 U. S. 290	36, 38
Kellom v. United States, 55 C. Cls. 174	40
Keyton v. Anderson, 229 F. 2d 519	36
Kirkpatrick v. Gray, 198 F. 2d 533, certiorari denied, *sub. nom. Priestly v. Donaldson*, 344 U. S. 880	37
Kohlberg v. Gray, 207 F. 2d 35, certiorari denied, 346 U. S. 937	36
Kutcher v. Gray, 199 F. 2d 783	20, 38
Litchfield v. Register and Receiver, 9 Wall. 575	37
Love v. United States, 119 C. Cls. 486, certiorari denied, 342 U. S. 866	37
McNulty v. United States, 126 C. Cls. 573	37
Manning v. Stevens, 208 F. 2d 827	38
Money v. Anderson, 208 F. 2d 34	38
Mulligan v. Andrews, 211 F. 2d 28	38
Myers v. United States, 272 U. S. 52	36
Ness v. Fisher, 223 U. S. 683	35
Palmer v. United States, 121 C. Cls. 415	37
Perkins v. Elg, 307 U. S. 325	20
Perkins v. Lukens Steel Co., 310 U. S. 113	37
Peters v. Hobby, 349 U. S. 331	13, 14, 17, 18, 20, 41
Powell v. Brannan, 196 F. 2d 871	37
Reagan v. United States, 182 U. S. 419	36
Riverside Oil Co. v. Hitchcock, 190 U. S. 316	37
Sawyer, In re, 124 U. S. 200	36, 38
Scher v. Weeks, 231 F. 2d 494, certiorari denied, 351 U. S. 973	23
Securities Comm'n. v. Chenery, 318 U. S. 80	21
Smith v. Dulles, 236 F. 2d 739, certiorari denied, December 17, 1956	36
Stringer v. United States, 117 C. Cls. 30	38
Taylor and Marshall v. Beckham, 178 U. S. 548	38
Terry v. Stevens, 203 F. 2d 219	36

Cases—Continued

	Page
United States Graphite Co. v. *Sawyer*, 176 F. 2d 868, certiorari denied, 339 U. S. 904	37
United States v. *Guthrie*, 17 How. 284	36
United States v. *Wickersham*, 201 U. S. 390	38
United States ex rel. Chicago Gt. Western R. R. v. *I. C. C.*, 294 U. S. 50	37
United States ex rel. Girard Co. v. *Helvering*, 301 U. S. 540	37
Vandenbark v. *Owens-Illinois Co.*, 311 U. S. 538	31
Watson v. *Pace*, 201 F. 2d 713, affirming 101 F. Supp. 477	36
West v. *Hitchcock*, 205 U. S. 80	37
White v. *Berry*, 171 U. S. 366	36
Wilbur v. *United States*, 281 U. S. 206	37
Williams v. *Cravens*, 210 F. 2d 874	36
Wittner v. *United States*, 110 C. Cls. 231	38
Work v. *Rives*, 267 U. S. 175	37
Ziffrin, Inc. v. *United States*, 318 U. S. 73	31

Constitution and Statutes:

Constitution of the United States:	
Article II:	
Section 2	35
Section 3	33, 35
Act of July 26, 1935, 49 Stat. 501, Section 6 (44 U. S. C. 305)	32
Act of November 26, 1940, 54 Stat. 1211, as amended (5 U. S. C. 631a)	22
Act of July 5, 1946 (Department of State Appropriation Act, 1947, 60 Stat. 458)	17
Administrative Procedure Act, 60 Stat. 238, Section 3 (5 U. S. C. 1002)	32
Foreign Service Act of 1946 (60 Stat. 1007, ff., 22 U. S. C. 826, 906, 1007, 1008):	
Section 211 (22 U. S. C. 826)	17
Section 511 (22 U. S. C. 906)	22
Section 637 (22 U. S. C. 1007)	17, 23
Section 638 (22 U. S. C. 1008)	23
Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, as amended), Section 6 (5 U. S. C. 652)	22
Public Law 179, 81st Cong. (Department of State Appropriation Act, 1950, 63 Stat. 456), Section 104	3, 17

Constitution and Statutes—Continued

Public Law 488, 82d Cong. (Department of State Appropriation Act, 1952, 65 Stat. 575, 581), Section 103 ..... 2, 4, 9, 10, 11, 14, 15, 16, 17, 18, 19, 23, 28, 29, 43

Public Law 733, 81st Cong. (Act of August 26, 1950, 64 Stat. 476), Section 1 (5 U. S. C. 22-1) 17, 22, 28, 29, 33, 34, 41

61 Stat. 288 17

62 Stat. 315 17

64 Stat. 768 17

66 Stat. 555 17

Veterans Preference Act (Act of June 27, 1944, 58 Stat. 387, as amended):

Section 14 (5 U. S. C. 863) 22, 41

Section 20 (5 U. S. C. 869) 23

Miscellaneous:

96 Cong. Rec. 11709 29

2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1 38

Executive Order 9835 (12 F. R. 1935) as amended 2, 4, 9, 13, 14, 17, 28, 29

Part II, Section 3 24

Part III 5

Part V, Section 1 ..... 5, 7

Executive Order 10241 (16 F. R. 3690) 2, 5

Executive Order 10450 (18 F. R. 2489) 10

Hearings before the Subcommittee of the Senate Committee on Appropriations, Departments of State, Justice, Commerce, and the Judiciary Appropriations for 1951, 81st Cong., 2d sess., pt. 1, p. 622 27

Regulation 14, 13 F. R. 255, as revised, 13 F. R. 9366 ..... 5, 6

Regulations and Procedures of the State Department, adopted March 11, 1949:

Section 391.3 32

Section 392.2d 7

Section 392.1 26

Section 395.1 ..... 24, 25, 33

Section 395.6 24

Section 396.1 ..... 24, 25, 34

Section 396.12 ..... 25, 26

Miscellaneous Continued
Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951:
Page
Section 390 43
Section 391 43
Section 391.1 43
Section 391.2 44
Section 391.3 44
Section 391.4 45
Section 392 46
Section 392.1 27, 46
Section 392.2 46
Section 392.3 47
Section 393 47
Section 393.1 26, 27, 47
Section 393.2 48
Section 393.3 49
Section 393.4 50
Section 394 50
Section 394.1 50–55
Section 394.2 55–56
Section 395 56
Section 395.1 56
Section 395.2 57
Section 395.3 57–58
Section 395.4 58–59
Section 395.5 59–62
Section 395.6 62
Section 396 62
Section 396.1 62
Section 396.11 27, 62
Section 396.12 27, 63
Section 396.13 63
Section 396.2 64
Section 396.3 64–65
Section 396.4 65–66
State Department report to the Tydings Committee (S. Rept. 2108, 81st Cong., 2d sess.) 33
Taft, *Our Chief Magistrate and His Powers* (1916), p. 76 38

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 85–88) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 92–98) is reported at 235 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals (R. 98) was entered on June 14, 1956. The petition for a writ of certiorari was filed on September 11, 1956, and was granted on November 13, 1956 (R. 99). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

Board were approved by the Deputy Under Secretary of State (R. 42-43, 63).

After the issuance of Executive Order 10241, amending Part V of Executive Order 9835, the Loyalty Security Board again considered petitioner's case under the new loyalty standard set out in Executive Order 10241 and determined, on July 31, 1951, that no reasonable doubt existed as to petitioner's loyalty to the United States (R. 28, 42, 63). This decision of the Loyalty Security Board was also approved by the Deputy Under Secretary of State (R. 42–43, 63).

Petitioner's case was then referred by the Department of State to the Loyalty Review Board of the Civil Service Commission,[1] established by Executive Order 9835, Part III. Acting pursuant to its Regulation 14[2] (R. 1) the Board, after review of peti-

[1] Annex 2 to Respondents' motion for summary judgment. Though a part of the record, the State Department's letter, transmitting petitioner's file to the Loyalty Review Board, is not included in the printed record.

[2] Regulation 14 (13 F. R. 255), as revised through December 17, 1948 (13 F. R. 9366), provided as follows:

"(a) The Board, or an Executive Committee of the Board shall, as deemed necessary from time to time, cause post audits to be made of the files on loyalty cases decided by the employing Department or Agency, or by a Regional Loyalty Board.

"(b) The Board, or an Executive Committee of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board, or by any head of an employing Department or Agency, even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case to the head of the Agency concerned for hearing, with appropriate instructions or for such further

tioner's entire file, recommended on October 9, 1951, that a hearing be held (R. 1). On October 11, 1951, the Board advised petitioner by registered mail that it had determined that the "public interest" required that a new hearing be held in his case "as provided for in * * * Regulation 14" (R. 78–79). The letter further advised petitioner that the hearing before the Board would be based on the charges "heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges. The Loyalty Review Board will arrive at an independent judgment in this matter. The transcripts of all testimony taken below are a part of the co...plete file now before the Loyalty Review Board. However, you are invited to present any evidence you desire in your behalf at the hearing. You may present oral argument and you may, of course, be represented by counsel or other representative" (R. 79).

On November 8, 1951, a hearing was held before a panel of the Loyalty Review Board at which petitioner was present and testified and was represented by counsel (R. 1–2). Thereafter, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation (R. 30–32) to the effect that evidence had been taken at the November 8 hearing on the issue as to whether petitioner had disclosed in-

---

action or procedure as the panel may determine. In exceptional cases, if in the judgment of the Board or of an Executive Committee of the Board, public interest requires it, the panel may hold a new hearing in the case and after such hearing, affirm or reverse the determination or decision."

formation of a confidential or non-public character within the meaning of Part V of Executive Order 9835, as amended; and that, since the letter of charges given petitioner on March 24, 1950, had not stated specifications regarding the intentional and unauthorized disclosure of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment to the letter of charges, it was agreed that the Board might consider the entire matter and make a determination thereon as if the original letter of charges contained the following specification under section 392.2d of the 1949 Regulations and Procedures of the Department of State (Pet. Br. 62) (R. 32):

> Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

The stipulation recited further as follows (R. 32):

> Provided, however, that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 392.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its de-

termination instead to lay a security risk charge under section 393.1a of its regulations.

On December 12, 1951, the Board rendered its opinion (R. 1–14). On the basis of petitioner's relations and dealings with Philip C. Jaffe, editor of *Amerasia*, and with others after his return from China on April 12, 1945, and until his arrest in connection with the *Amerasia* case on June 6, 1945 (R. 3–11), the Board concluded as follows (R. 14):

> We are not required to find Service guilty of disloyalty, and we do not do so, but for an experienced and trusted representative of our State Department to so far forget his duty to his trust as his conduct with Jaffe so clearly indicates, forces us with great regret to conclude that there is reasonable doubt as to his loyalty. The favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed.

Petitioner's counsel was advised of the Board's decision on December 13, 1951 (R. 80). By letter of the same date (R. 33–35), the Chairman of the Loyalty Review Board advised the Secretary of State of the proceedings before the Board and of the Board's finding that there was a reasonable doubt as to petitioner's loyalty (R. 33–35). The Chairman's letter contained the following concluding paragraphs (R. 35):

> The Loyalty Review Board hereby submits to the Secretary of State its opinion: The employee, John Stewart Service, should be forthwith removed from the rolls of the Department of State; the Secretary should approve and

adopt the proceedings had, as heretofore recited herein; and such approval and adoption should appear on Standard Form 50, "Notification of Personnel Action."

Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service.

By letter dated December 13, 1951, petitioner was advised by the Deputy Under Secretary of State that the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress, had directed that petitioner's employment in the Foreign Service of the United States be terminated as of the close of business December 14, 1951 (R. 75–76). The official notifications of personnel action cite as authority for petitioner's termination "Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress" (R. 84–85). Thereafter, on December 27, 1951, in reply to petitioner's request for clarification of the reasons for termination of his employment, petitioner was advised by letter that his employment "was terminated solely as a result of the * * * finding of the Loyalty Review Board of the United States Civil Service Commission" (R. 76–77).

Petitioner subsequently applied to the Civil Service Commission for relief and was informed by the Chairman of the Commission (R. 38–39) that the decision of the Loyalty Review Board was in the nature of a recommendation; that the Secretary of State had terminated petitioner's services pursuant to Executive Order 9835, as amended, and Section 103 of Public

Law 188; and that the Civil Service Commission had no power to review the action of the Secretary of State, noting that the dismissal of petitioner was within the exclusive province of the Secretary of State (R. 38).

2. PROCEEDINGS BELOW

Petitioner's original complaint was filed in the district court on November 1, 1952. The third and last amended complaint (R. 40–61), filed on October 20, 1953,[3] challenged the validity of petitioner's separation on procedural and constitutional grounds and sought, by way of relief, (1) a declaratory judgment that his separation was invalid; (2) an order directing the Civil Service Commission and Loyalty Review Board to vacate the Board's letter of December 13, 1951 to the Secretary of State; (3) an order directing that State Department and Civil Service records be expunged of all written statements reflecting that petitioner's employment was terminated on the ground that there was a reasonable doubt as to petitioner's loyalty to the United States; (4) an order directing that petitioner be reinstated to his position in the Foreign Service with property rights and salary to the date of reinstatement; and (5) a public retraction of defamatory matter uttered and published in con-

[3] In addition to the Secretary of State, the complaint cited as defendants the Civil Service Commission and the Loyalty Review Board and the individual members of each (R. 39–40). The Loyalty Review Board ceased to exist on September 24, 1953 (Executive Order 10450 (18 F. R. 2489)). The action, therefore, abated as to the individuals formerly comprising the Board and as to them was dismissed by the district court (R. 85).

nection with his discharge from employment (R. 59–60).

Respondents answered the complaint (R. 62–67) and both petitioner (R. 70–71) and respondents (R. 80–81) moved for summary judgment. Respondents' motion was accompanied by the affidavit of Dean Acheson, Secretary of State, dated January 19, 1953, which states, in material part, as follows (R. 81–83):

> 1. I am the Secretary of State and have been such since January 21, 1949.
>
> 2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.
>
> 3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made

a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

Attached to Secretary Acheson's affidavit were State Department documents (R. 83–85) denoting the personnel action taken in petitioner's case which recite that the termination authority for petitioner's

separation were Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress (R. 84, 85).

While the motions for summary judgment were pending before the district court, this Court, on June 6, 1955, rendered its decision in *Peters* v. *Hobby*, 349 U. S. 331. On the authority of that decision, the district court declared the finding and opinion of the Loyalty Review Board to be a nullity (R. 88). However, since petitioner's removal rested not only upon Executive Order 9835, as amended, but also upon Section 103 of Public Law 188, 82d Congress, the district court sustained petitioner's separation as a valid exercise of the Secretary's "absolute discretion" under Public Law 188, 82d Congress (R. 88).

The order of the district court (R. 89–90) directed the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). In all other respects, the court granted respondents' motion for summary judgment and denied that of petitioner (R. 90).

On appeal, the Court of Appeals for the District of Columbia Circuit (R. 92–98) agreed that the finding and opinion of the Loyalty Review Board were invalid (R. 97–98) but, noting that petitioner's separation was based on the Secretary's authority conferred by Section 103 of Public Law 188, 82d Congress as well as Executive Order 9835, as amended, and that the Secretary had exercised his own discretion in terminating petitioner's employment, the court affirmed the order of the district court with the addi-

tional notation that petitioner's discharge under Section 103 "carried no implication that he might be either disloyal or a security risk" (R. 98).

SUMMARY OF ARGUMENT

I

Petitioner's employment was terminated by the Secretary of State "[a]cting in the exercise of the authority vested in [him] by Executive Order 9835 [relating to loyalty proceedings] * * * and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581) * * *" (R. 81–83). In accordance with this Court's opinion and decision in *Peters* v. *Hobby*, 349 U. S. 331, the district court has ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Petitioner's dismissal from the Foreign Service by the Secretary of State rested, however, not only on the supposed authority of Executive Order 9835, as amended, under which the Loyalty Review Board purported to act, but also upon Section 103 of Public Law 188, 82d Congress, which gave to the Secretary of State the authority, in his "absolute discretion" and notwithstanding the provisions of any other law, to dismiss any employee of the Department of State whenever such action was deemed "necessary or advisable in the interests of the United States." It is in this respect that petitioner's case critically differs from the *Peters* case, and it is upon this statutory authority that the courts below sustained petitioner's separation.

A. In dismissing petitioner from the Foreign Service, the Secretary of State specifically invoked the statutory authority of Section 103. That the Secretary, in exercising his "absolute discretion" under that statute, looked no further than to the finding and opinion of the Loyalty Review Board, affords no basis for invalidating petitioner's removal. Although the Board lacked jurisdiction and its opinion and finding alone could not sustain petitioner's dismissal, the record shows that the Secretary considered the Board's opinion and finding as "merely an advisory recommendation" (R. 83) and recognized that he was legally free to exercise his own judgment as to whether petitioner's employment should be terminated. Being under no misapprehension as to the effect of the Board's recommendation, and having used his own judgment, his decision to terminate petitioner's services is valid and must be sustained under the independent authority of Section 103 of Public Law 188, 82d Congress.

B. Assuming that a dismissal under Section 103 was subject to regulations promulgated by the State Department applicable to loyalty and security cases, petitioner received all the procedural protections those regulations afforded. However, petitioner's removal from Government service under the authority of Section 103 "in the interests of the United States", and not on loyalty or security grounds, was not subject to these regulations. Compliance with the regulations was necessary only where, unlike this case, dismissal was explicitly predicated upon loyalty or security grounds. As petitioner's removal was not

subject to any other statutory or regulatory limitation, there is no question in this case as to whether the Secretary of State was bound by his own regulations.

II

From the beginning of our constitutional history, appointment to and removal from federal office has always been regarded as a matter for executive discretion. In the absence of clear and express legislative limitations, the courts have held that challenges to appointments and dismissals present no justiciable issue. This doctrine has been based on the reluctance of the courts to interfere with the executive branch in the performance of its constitutional function, and on the view that, except as Congress may otherwise provide, Government employees hold office only at the pleasure of their superiors. Petitioner's dismissal, not subject to procedural limitation, thus represents an exercise of absolute discretion and, as such, the Secretary's decision to terminate petitioner's employment is not subject to judicial inquiry or revision.

ARGUMENT

I

THE SECRETARY OF STATE VALIDLY EXERCISED THE ABSOLUTE DISCRETION VESTED IN HIM BY SECTION 103 IN TERMINATING PETITIONER'S EMPLOYMENT

Petitioner's employment was terminated by the Secretary of State "[a]cting in the exercise of the authority vested in [him] by Executive Order 9835

[relating to loyalty proceedings] * * * and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581) * * * " (R. 81–83). In accordance with this Court's decision in *Peters* v. *Hobby*, 349 U. S. 331, the district court has ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Executive Order 9835 cannot therefore provide authority for petitioner's dismissal, and the only question now before this Court is whether the further and independent authority invoked by the Secretary of State—*i. e.*, Section 103—provided a basis for the valid exercise of executive discretion in terminating petitioner's employment.

Section 103 was reenacted[4] at a time when the Secretary of State already had authority to terminate employment when such action was either deemed necessary in the interest of "national security" (Section 1 of the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1) or there was a reasonable doubt as to the employee's loyalty (Executive Order 9835).[5] Clearly, therefore, Congress intended in Section 103 to confer upon the Secretary of State authority be-

[4] The "McCarran Rider," first appeared in the Department of State Appropriation Act, 1947, 60 Stat. 458. A like provision was contained in each succeeding appropriation act through the fiscal year 1953. 61 Stat. 288; 62 Stat. 315; 63 Stat. 456; 64 Stat. 768; 66 Stat. 555.

[5] Authority for removal of Foreign Service officers was also provided by the Foreign Service Act of 1946, 60 Stat. 1007, *et seq.*, 22 U. S. C. 826, *et seq.*. See fn. 9, *infra*, p. 22.

yond that already existing, and this intent is manifested in the language of the statute itself. Section 103 provides:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

The only basis for termination under section 103 was that the Secretary of State shall deem such action "necessary or advisable in the interests of the United States," and it is apparent that this determination was in fact made by Mr. Acheson, who specifically invoked this statute (R. 81–84).

We undertake first to show that this determination may not be upset merely because it was based upon a review by the Secretary of the opinion of the Loyalty Review Board—which opinion the Board concededly had no jurisdiction to render.[6] Next, assuming that the "absolute discretion" conferred by

---

[6] In view of the conceded invalidity of the proceedings before the Loyalty Review Board of the Civil Service Commission, the constitutional issues posed and discussed by petitioner (Pet. Br. 2–3, 21–29), with respect to the Board proceedings, need not be resolved (*Peters* v. *Hobby*, 349 U. S. at 338) and are not, therefore, discussed in this brief. See, however, the Respondents' Briefs in *Bailey* v. *Richardson*, No. 49, Oct. T., 1950, pp. 56–99; *Peters* v. *Hobby*, No. 376, Oct. T., 1954, pp. 29–92. Proceedings which lead merely to a recommendation for executive action are, in any event, not subject to judicial review. Cf. *Chicago and S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103.

Congress in Section 103 is susceptible of procedural limitation by the Secretary of State (the courts below thought it was not (R. 88; 97)) and was in fact limited by departmental regulations applicable to petitioner's case, we show that there was full compliance with such regulations. However, we submit that the regulations by their terms do not impose procedural limitations on the exercise of the discretion vested in the Secretary of State by Section 103 to terminate employment "in the interests of the United States," invoked in his disposition of petitioner's case. Finally, in Point II we show that the appointment and removal of Government employees is a matter of executive discretion which is subject to judicial review only for compliance with applicable statutes or regulations, and since there has been such compliance here the validity of petitioner's dismissal is not a question which "the long tradition of our history has made appropriate for disposition by judges" (Frankfurter, *J.*, concurring in *American Communications Association* v. *Douds*, 339 U. S. 382, 416).

A. THE TERMINATION OF PETITIONER'S EMPLOYMENT BY THE SECRETARY OF STATE, IN THE EXERCISE OF HIS ABSOLUTE DISCRETION, IS UNAFFECTED BY THE LOYALTY REVIEW BOARD'S LACK OF JURISDICTION

Even if it be assumed, *arguendo*, and contrary to the authorities discussed in Point II (*infra*, pp. 35–41), that the reasons which motivated the exercise of the absolute discretion vested in the Secretary of State by Section 103 are a proper subject for judicial inquiry, the fact that the Secretary determined that petitioner's

dismissal was "necessary or advisable in the interests of the United States" as a result of his review of the opinion of the Loyalty Review Board (R. 82) affords no basis for invalidating that determination. In exercising his plenary authority under Section 103, the Secretary labored under no misapprehension as to the binding effect of the Loyalty Review Board's opinion.[7] Rather, he considered that opinion "merely an advisory recommendation" (R. 83) and recognized that he was "legally free" to exercise his *own* judgment as to whether or not petitioner's employment should be terminated (R. 83). Exercising his own judgment (R. 83), the Secretary made the "necessary determination" under Section 103 and decided to terminate petitioner's employment (R. 82–84). Although the Secretary looked no further than the opinion and finding of the Loyalty Review Board, the decision here is nonetheless his own and, as such, represents a valid exercise of his "absolute discretion", not "subject to revision in the courts." *Eberlein* v. *United States*, 257 U. S. 82, 84, discussed *infra* at pp. 40–41; *Jay* v. *Boyd*, 351 U. S. 345, 353–354."[8]

[7] Compare *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C.), where the agency head acted in the erroneous belief that he was legally bound to follow the recommendation of the Board, and *Peters* v. *Hobby*, 349 U. S. 331, where the Board itself purported to debar Peters from federal service.

[8] Since petitioner's dismissal represents an exercise of the Secretary's "absolute discretion," *Perkins* v. *Elg*, 307 U. S. 325, is of no aid to petitioner. In that case, the Secretary's denial of a passport was based *solely* on a belief in the applicant's noncitizenship, a belief which this Court determined to be erroneous. The decision thus precluded the denial of the passport on noncitizenship grounds (*ibid.*, at 350). But beyond

Although it is not questioned that the Loyalty Review Board lacked jurisdiction to render the finding and opinion which formed the basis for the exercise of Mr. Acheson's discretion (R. 86), it does not follow that the findings of that Board were for all purposes a nullity. Because the Loyalty Review Board lacked jurisdiction, its findings could not, of their own force, alter the legal rights of petitioner and we have conceded, therefore, that, insofar as the termination of employment was predicated upon Executive Order No. 9835, it cannot be sustained. But the opinion and findings of the Loyalty Review Board nevertheless represent a *de facto* determination by highly qualified and impartial persons, and therefore provided a valid basis for the exercise of the absolute discretion vested in the Secretary of State. Cf. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (orders of Civil Aeronautics Board, allegedly not based on substantial evidence, which had only the force of a recommendation to the President, held not subject to judicial review). The Secretary properly could have exercised his absolute discretion by basing his determination solely upon the views of private citizens, former Secretaries of State, senior Foreign Service officers, comments of members of Congress, or any other source which led him to believe that petitioner's action in lending Jaffé copies of his Foreign Service reports and giving him other

---

that determination, the Court significantly did not purport to superintend the discretionary authority of the Secretary in the issuance or denial of a passport.

And because the Secretary of State in fact exercised his discretion in petitioner's case, *Accardi* v. *Shaughnessy*, 347 U. S. 260 and *Securities Comm'n* v. *Chenery*, 318 U. S. 80, are inapposite.

information which he had learned in the course of his official duties in China called for his removal "in the interests of the United States." Cf. *Hammond* v. *Hull*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777.

Petitioner's speculative assertion (Pet. Br. 30) that the Secretary would not have removed petitioner if he had known that the decision of the Loyalty Review Board was a "nullity" finds no support in the record. No such view is stated in the Secretary's affidavit, and petitioner, who had the burden of proving the facts necessary to support his action, did not avail himself of his opportunity in the district court to produce evidence to this effect.

B. PETITIONER'S REMOVAL UNDER SECTION 103 WAS NOT IN VIOLATION OF ANY STATUTORY OR REGULATORY RIGHT

1. *The statutory conditions otherwise applicable to employee removals were superseded by Section 103.*— At the time petitioner's employment was terminated, procedural rights applicable to removals from Government employment were conferred, generally, by three statutes: Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, as amended, 5 U. S. C. 652); Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1); and Section 14 of the Veterans Preference Act (Act of June 27, 1944, 58 Sfat. 390, as amended, 5 U. S. C. 863).[9]

[9] Foreign Service officers, being appointed by the President with the advice and consent of the Senate (Act of August 13, 1946, 60 Stat. 1007, 22 U. S. C. 906), are not in the classified Civil Service. Act of November 26, 1940, 54 Stat. 1211, as amended, 5 U. S. C. 631a. Nor are they entitled to the pro-

It is clear that none of these Acts provide a basis for invalidating petitioner's dismissal. For the explicit congressional purpose manifested in Section 103 was to vest in the Secretary absolute discretion, "notwithstanding the provisions * * * of any other law," to terminate summarily the employment of any Foreign Service officer so long as he deemed such termination "necessary or advisable in the interests of the United States." See *Scher* v. *Weeks*, 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973.

2. *Assuming their applicability, regulations promulgated by the Department of State with respect to employee-removal proceedings were complied with in petitioner's case.*—Petitioner contends that regulations of the Department of State promulgated in 1949 (App. Pet. Br. 61–73) apply to this case despite the fact that they were superseded in 1951 prior to the termination of petitioner's employment. It is further urged (Pet. Br. 37–38) that the 1949 regulations

---

tection of the Veterans Preference Act. Section 20 of the Veterans Preference Act, *supra* (5 U. S. C. 869). Section 638 of the Foreign Service Act of 1946 (60 Stat. 1016, 22 U. S. C. 1008) provides that, before any Foreign Service officer may be separated by the Secretary of State for misconduct or malfeasance in office, he shall be granted a hearing before the Foreign Service Board and his misconduct or malfeasance must be established at that hearing. By Section 637 of that Act (60 Stat. 1016, 22 U. S. C. 1007), the Secretary may separate a Foreign Service officer for unsatisfactory performance of duty after a hearing before the Board, and the unsatisfactory performance of duty must be established at that hearing. To the extent that these sections of the Foreign Service Act might serve to restrict the Secretary's removal authority, they too were rendered inapplicable to the petitioner's case by reason of Section 103 of Public Law 188, 82d Congress.

were not complied with in petitioner's case, and that the termination of his employment was, therefore, invalid. We show (*infra*, pp. 28–35) that neither the 1949 nor the 1951 regulations apply to this case, but at this point in our argument we assume their applicability and show that under either set of regulations petitioner was validly dismissed from the Foreign Service under Section 103.

(*a*). *The 1949 regulations:* Petitioner first urges (Pet. Br. 37) that Section 395.6 of the 1949 regulations provided that a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The short answer to this contention is that the regulation contained no such provision, but merely provided that the employee be notified of the favorable decision. Nothing in Section 395.6 precluded further action by the Secretary of State under the independent authority of the "McCarran Rider."

Petitioner next contends (Pet. Br. 38) that he was denied an appeal to the Secretary of State, as allegedly provided for in Executive Order 9835 (Part II, Section 3) and in Sections 395.1 and 396.1 of the 1949 regulations (App. Pet. Br., pp. 67–70). This contention is without merit for the reason that those sections relate only to appeals to the Secretary of State or his designees from *adverse* decisions of the Loyalty Security Board of the Department of State. Petitioner received favorable decisions from that Board and was not therefore appealing from those decisions. The appeal which petitioner sought was from an adverse decision of the Loyalty Review

Board, and the regulations do not provide for such an appeal. Moreover, petitioner ultimately was removed because the Secretary of State determined that his employment should be terminated under Section 103 in the interests of the United States. Clearly, Sections 395.1 and 396.1 do not provide for an appeal *to* the Secretary of State from such a decision *of* the Secretary of State, and, of course, the regulations did not state that the only basis for dismissal by the Secretary of State would be an adverse finding as to loyalty or security.

With final reference to the 1949 regulations, petitioner urges (Pet. Br. 38) that Section 396.12 was violated by the proceedings herein. Section 396.12 provides that, upon the exercise of the right of appeal as permitted by Sections 395.1 and 396.1, a hearing will be held and that "[n]o witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned." But we have already shown, *supra*, p. 24, that the appeals provided for in Sections 395.1 and 396.1 were entirely inapplicable to petitioner's case. Petitioner abstracts from the above-quoted portion of Section 396.12 the words "contained in the record or submitted at that hearing," and urges that the statement in the Secretary's affidavit that he failed to read the testimony in petitioner's case, (R. 81–83) indicates a violation of this section. Petitioner thus reads this section as requiring that the Secretary personally review the entire proceedings in the case, but nothing

in Section 396.12, even if applicable to petitioner's case,[10] imposes such a requirement upon the Secretary. The requirement is merely that "new" evidence not be presented to the Secretary for the first time.

(*b*). *The 1951 regulations:* In urging that the 1951 regulations, if applicable, were also violated by the procedures followed in this case, petitioner relies upon Section 393.1 which provides:

> 393.1 *Security Standard*
>
> The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.[11]

But the only decision to which Section 393.1 relates is that the removal of the officer or employee involved is "necessary or advisable in the interest of national security." Nothing in this section purports to prescribe the procedure to be followed in determining that removal is "necessary or advisable in the interest of the United States," and it was this latter determination, made in the Secretary of State's absolute discretion, which led to petitioner's dismissal. In the

---

[10] We show *infra* at p. 28 that the regulations had no application to the exercise of absolute discretion under Section 103.

[11] This last sentence also appears in § 392.1 with respect to loyalty cases where it has reference to the decision that reasonable grounds exist for belief that the employee is disloyal.

affidavit of the Secretary of State, he states that he did not read the testimony taken in the proceedings in this case, nor make an independent determination on the evidence submitted before the Boards as to whether there was reasonable doubt as to petitioner's loyalty. (R. 82.) But Mr. Acheson does *not* state that he arrived at the decision referred to in either Section 393.1 or 392.1 (R. 81–83), *i. e.*, that removal is necessary for reasons of security or loyalty. Moreover, in his affidavit, the Secretary of State explicitly stated that he considered the opinion of the Loyalty Review Board to be merely an advisory recommendation which left him free to exercise his own judgment and that he understood that the responsibility was vested in him to make the necessary determination under Section 103 (R. 82). This decision, that the termination of petitioner's employment was "necessary or advisable in the interests of the United States," the Secretary was free to make unfettered by any procedural limitations imposed by Section 393.1 or 392.1.[12]

Equally without merit is the asserted violation by the Secretary of State of Sections 396.11 and 396.12 of the Regulations. These sections (Appendix, *infra*, pp. 62–63, like their 1949 counterparts, see p. 24, *supra*, relate to appeals to the Secretary of State from

[12] That the authority to terminate employment conferred by the "McCarran Rider" was regarded by Mr. Acheson as being above and beyond that relating to loyalty and security dismissals is further indicated by his testimony contained in Hearings before the Subcommittee of the Senate Committee on Appropriations, Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951, 81st Cong., 2d Sess., Pt. 1, p. 622.

adverse decisions of the Loyalty Security Board of the State Department. In view of the favorable decisions petitioner received from that Board, these sections are entirely inapposite and petitioner's contention without merit.

3. *Neither the 1949 nor the 1951 regulations applied to petitioner's dismissal.*—Petitioner concedes that Section 103 of Public Law 188 under which he was dismissed "itself required no procedural safeguards" (Pet. Br. 35). Yet petitioner contends, contrary to the holding of the courts below (R. 88; 97), that the regulations promulgated by the Department of State circumscribed the absolute discretion which Congress vested in the Secretary of State.

(*a*). It is clear from the language of Section 103, and the fact that it was enacted at a time when other authority existed to dismiss on loyalty and security grounds, that Congress intended to confer upon the Secretary of State a broader and unfettered discretion to terminate the employment of any officer or employee of the Foreign Service whenever such action was deemed necessary or advisable in the interest of the United States. Nothing in the language of Section 103 limited the exercise of this absolute discretion to cases involving persons whose loyalty or security was doubted. Subsequent to the enactment of Section 103, persons as to whom there was a reasonable doubt as to loyalty might be dismissed from Government service pursuant to Executive Order 9835, and when deemed necessary in the interest of national security, employment could be terminated under Section 1 of the Act of August 26, 1950, 64

Stat. 476, 5 U. S. C. 22–1. Section 103, therefore, clearly provided a third and independent basis for terminating Government employment. And in exercising the discretion to terminate employment "in the interests of the United States," as the courts below held (R. 88; 97), "[i]t was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under [the 'McCarran Rider']."[13] Thus, *Accardi* v. *Shaughnessy*, 347 U. S. 260, is inapposite, for

---

[13] See remarks of Senator Ferguson speaking in opposition to a motion to strike the "McCarran Rider" from the 1951 Appropriations Act, 96 Cong. Rec. 11709. Senator Ferguson stated:

> I happened to be a member of the Appropriations Committee when the Senator from Nevada and other members of the committee had Mr. Byrnes, the then Secretary of State, before them, when this question was discussed initially and when this amendment was first placed in an appropriations bill. I am sure that if the Senate could have heard the former Justice of the Supreme Court they would understand that he, too, wants to protect all the rights of the citizens of the United States. But he also recognized and he spoke for something that was vital. He stated the fundamental proposition that employment by the United States Government is a privilege, and not an absolute right.
>
> Mr. Byrnes further recognized that if the head of a department such as the State Department or the Commerce Department were to protect the security of the United States in such a vital spot, vital to the people of America, *it would be necessary to give the Secretary of such department the right to discharge without trial. Without such authority it would be impossible for those department heads to operate their departments efficiently and for the safety and security of the United States.* [Emphasis added.]
>
> It was an established fact that without such authority it would have been impossible for the Secretary of State to have discharged Mr. Carl Marzani. That individual had had a trial before the Civil Service Commission, but as it developed he could not be discharged except by virtue of the McCarran rider. I hope the Senate will not undo the splendid work which was done by the senior Senator from Nevada when, in response to the representations of Sec-

there this Court, in holding that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner" (*supra*, at 267), was not dealing with a statute, the language and history of which reflect, as does the "McCarran Rider," a clear congressional purpose to permit the Secretary to act in his absolute discretion and without regard to any otherwise applicable departmental procedures.

Moreover, the regulations of the Department of State did not purport to circumscribe the exercise of the Secretary's absolute discretion to terminate employment in the interests of the United States. Both the 1949 and the 1951 Regulations of the Department of State explicitly relate to terminations based upon loyalty or security grounds and make no reference to other terminations deemed "necessary or advisable in the interests of the United States." For this further reason, therefore, these regulations were inapplicable to petitioner's dismissal and this case does not actu-

---

retary Byrnes, he had this amendment included in the bill by the Appropriations Committee.

The Senate has affirmed it on various occasions, and the House likewise has seen fit to do so. In placing this provision in the bill the House showed its understanding of the Remington case. The House knew that William Remington was placed back in the Department of Commerce when there were the most serious questions against his loyalty. He has since been removed in the face of an indictment for perjury because he had stated he was not a Communist, but if the Secretary of Commerce had not had the authority for dismissal contained in this provision he would today be working in the Department of Commerce.

It is also clear that the ends to be served by the "McCarran Rider," *i.e.*, to operate departments "efficiently and for the safety and security of the United States," are broader in scope than the criteria of loyalty and security.

ally present the question urged by petitioner (Pet. Br. 44–47) whether the Secretary of State is bound by his own regulations. Cf. *Accardi* v. *Shaughnessy, supra.*

(*b*). The 1951 Regulations are the controlling regulations in determining whether the State Department regulations purported to prescribe procedures applicable to petitioner's case, for, at the time of petitioner's dismissal (December 14, 1951), the *Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State,* as adopted March 11, 1949 (App. Pet. Br. 61–73) had been superseded by regulations adopted May 4, 1951, and revised September 21, 1951 (Appendix, *infra*, pp. 43–66). The procedural regularity of petitioner's removal must, therefore, be measured, if at all, by the 1951 Regulations. To do so does not involve any "retroactive" application of those regulations. *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78; cf. *Carpenter* v. *Wabash Ry. Co.,* 309 U. S. 23, 26–27; *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, 541–543; *Bruner* v. *United States,* 343 U. S. 112.

Petitioner, however, urges that the superseded 1949 regulations govern this case. This contention is based on the assertion that petitioner did not know of the 1951 regulations prior to this litigation (Pet. Br. 38) and the charge that those regulations were secret (Pet. Br. 43). These charges are wholly without support in the record. Neither the 1949 nor the 1951 Loyalty and Security Regulations of the Department of State were published in the Federal Register because the statute establishing the Federal Register

contemplates that agency regulations, such as these, dealing only with procedures applicable to Government employees, shall not be published in the Register. Section 6 of the Act of July 26, 1935, 49 Stat. 501, 44 U. S. C. 305. And Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, similarly excepts from the publication requirement any matter relating solely to the internal management of an agency. The 1951 regulations of the Department of State were distributed by the Department in accordance with normal distribution procedures, and copies were available to any employee upon request. Of course, it was the 1949 regulations which were forwarded to petitioner along with the initial letter of charges on March 24, 1950, since those regulations were then in effect (R. 29), but such action did not preclude the Department of State from later amending its regulations.[14]

(c). Petitioner's desire to have the 1949 regulations govern his case is, in any event, a fruitless one. He seeks to support his contention that departmental regulations limited the exercise of "McCarran Rider" discretion by pointing to Section 391.3 of the 1949 regulations, which provided that:

* * * * *

> In addition, the Secretary of State has been granted by Congress the right, in his absolute

[14] The stipulation entered into by petitioner's attorney and the chairman of the Loyalty Review Board added additional charges based upon the 1949 regulations, but this stipulation was an amendment to the letter sent on March 24, 1950 (R. 28), and does not, in any event, establish that the 1949 regulations were to govern the ultimate disposition of this case.

> discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

But this provision, in context, is at most a statement of departmental policy which goes no farther than to say that "so far as possible" certain procedures would be followed under the substantive authority of the "McCarran Rider" with respect to loyalty and security cases. The very title of the regulations ("*Regulations and Procedures Relating to Loyalty and Security of Employees, U. S. Department of State*," App. Pet. Br. 61) indicates that their scope was limited to such cases and nothing contained in those regulations supports the proposition that they were intended to prescribe procedural limitations for other terminations deemed "necessary or advisable in the interests of the United States."[15] Sections 395.1

---

[15] The 1949 regulations, of course, antedated the Act of August 26, 1950, 5 U. S. C. 22-1, providing for the summary suspension and, after specified procedural steps, termination of employment where deemed "necessary or advisable in the interest of the national security of the United States * * *." See *Cole* v. *Young*, 351 U. S. 536.

[16] The State Department report to the Tydings Committee (S. Rep. 2108, 81st Cong., 2d Sess., pp. 14-17; Pet. Br. 37-38) was based on the 1949 regulations and was directed solely to the question of loyalty and security dismissals. President Truman's letter of September 6, 1950, with respect to the "McCarran Rider" effective during the fiscal year 1951 (R.

and 396.1 of the 1949 regulations, on which petitioner particularly relies (Pet. Br. 38), in turn make it clear that they relate only to determinations with respect to loyalty or security risks, not to dismissals "necessary or advisable in the interests of the United States."

The 1951 regulations which, we submit, were the only regulations possibly applicable here, made reference to the "McCarran Rider" authority of the Secretary of State only with respect to security cases (Section 391.3, App. *infra*, p. 44) and, like the 1949 regulations, did not purport to limit the exercise of discretion in determining whether termination was necessary or advisable in the interests of the United States. Moreover, the opinion of the Loyalty Review Board, on the basis of which the Secretary of State exercised his absolute discretion, dealt solely with the finding that there was a reasonable doubt as to petitioner's loyalty and made no finding with respect to security.[17]

90–91) is likewise of no avail to petitioner. The letter reflects the President's concern for the procedural rights of employees in cases involving the "national security" and manifests the President's "desire" that in exercising his discretionary removal power in such cases the Secretary of State follow the procedures outlined in Public Law 733 (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1). The letter cannot be construed to create procedural rights in an employee. If, in petitioner's case, the Secretary acted in disregard of the President's desires—and we think he did not—the Secretary may have been accountable to the President but not to petitioner. *Matter of Heaven*, 13 Pet. 230, 261.

[17] Had petitioner's removal rested upon security grounds, undoubtedly Secretary Acheson would have cited the Act of August 26, 1950 (5 U. S. C. 22–1), *supra*, p. 33, fn. 15, as an authority for his dismissal.

The regulations which referred to the "McCarran Rider" solely with respect to security cases are, for that further reason, inapplicable.

It is clear, therefore, that in exercising his absolute discretion to terminate petitioner's employment, the Secretary of State violated no rights conferred upon petitioner by any applicable statute or departmental regulations. Accordingly, as we show in the following point, the validity of the termination of petitioner's employment is the type of question which this Court has traditionally refrained from reviewing.

II

THE APPOINTMENT AND REMOVAL OF GOVERNMENT EMPLOYEES IS A MATTER OF EXECUTIVE DISCRETION WHICH IS SUBJECT TO JUDICIAL REVIEW ONLY FOR COMPLIANCE WITH APPLICABLE STATUTES OR REGULATIONS

From the beginning of our constitutional history, it has been settled that questions of tenure of office are basically not judicial questions, except as Congress may impose statutory requirements which become judicially enforceable. Responsibility for the quality of Government officers and employees is vested by the Constitution in the executive and legislative branches. Art. II, Secs. 2, 3. In particular, it has long been settled that the President has a discretionary power of removal, derived from the nature of his executive office, which is unrestricted except as Congress, in the exercise of its power to provide for the appointment of inferior federal officers (Constitution, Art. II, Sec. 2), may validly limit it by

general legislation. *Myers* v. *United States*, 272 U. S. 52.

In the absence of legislative restraint upon the executive's discretionary power to remove inferior Government officers and employees, the courts have consistently refused to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that there has been compliance with the mandate of Congress. At no time have the courts intervened to review the basis for executive action (cf. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103) or to substitute their judgment for that of the officials. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United States*, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Pet. 230; *United States* v. *Guthrie*, 17 How. 284.[18]

Judicial non-intervention in the field of personnel administration is, of course, merely one application

[18] See also, *A. Lincoln Green* v. *Baughman*, No. 13,500 (C. A. D. C.), decided January 31, 1957; *Ellmore* v. *Brucker*, 236 F. 2d 734, 736–737 (C. A. D. C.), certiorari denied, December 17, 1956; *Smith* v. *Dulles*, 236 F. 2d 739, 742 (C. A. D. C.), certiorari denied, December 17, 1956; *Keyton* v. *Anderson*, 229 F. 2d 519 (C. A. D. C.); *Boylan* v. *Quarles*, 235 F. 2d 834 (C. A. D. C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C. A. D. C.), certiorari denied, 346 U. S. 937; *Blackman* v. *Lee*, 205 F. 2d 13 (C. A. D. C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C. A. D. C.); *Watson* v. *Pace*, 201 F. 2d 713 (C. A. D. C.), affirming 101

of the long-recognized principle that "the interference of the courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and * * * that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516.[19] The constitutional responsibility of the executive and legislative branches of the Government in matters of personnel administration of necessity comprehends, as a corollary of the appointive authority, the power of removal. And no function is more clearly internal to the executive branch than the selec-

---

F. Supp. 477 (D. D. C.); *Kirkpatrick* v. *Gray*, 198 F. 2d. 533 (C. A. D. C.), certiorari denied, *sub nom. Priestly* v. *Donaldson*, 344 U. S. 880; *Powell* v. *Brannan*, 196 F. 2d 871 (C. A. D. C.); *Devine* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826, *Ciaffone* v. *United States*, 126 C. Cls. 532; *McNulty* v. *United States*, 126 C. Cls. 573; *Engelhardt* v. *United States*, 125 C. Cls. 603; *Palmer* v. *United States*, 121 C. Cls. 415; *Blum* v. *United States*, 120 C. Cls. 232; *Love* v. *United States*, 119 C. Cls. 486, certiorari denied, 342 U. S. 866; *Croghan* v. *United States*, 116 C. Cls. 577; *Dupre* v. *United States*, 116 C. Cls. 660.

[19] See also *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131-132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

tion and retention or dismissal of its employees.[20] As the court below succinctly observed in *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918, "the judiciary cannot assume responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power." (182 F. 2d at 62.)

The inappropriateness of judicial inquiry into the ground of removal of a public officer or employee is further manifested by the nature of public office. It has been held repeatedly that the appointment to and the tenure in public office are not contract or property rights. *Taylor and Marshall* v. *Beckham*, 178 U. S. 548; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Butler* v. *Pennsylvania*, 10 How. 402; see 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1. Therefore, if office is held at the discretion of the appointing authority, "this

[20] "The framers of our Constitution had one essential feature of efficient government clearly in mind. They gave to the Executive officer charged in law with the responsibility and actually charged by the people with the responsibility of carrying on the Executive department of the government, the power and means of meeting that responsibility. They vested in him complete power to appoint all the officers of the government who were subordinate to him, and upon whose political capacity and governmental discretion would depend the wise carrying out of his policies. They gave him the power of absolute removal, and they placed in his hands the control of the action of all those who took part in the discharge of the political duties of the executive department. They acted on a sound political principle * * *." Taft, *Our Chief Magistrate and His Powers* (1916), p. 76.

court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. 'If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; * * *.'" *Matter of Hennen*, 13 Pet. 230, 261.

Although the advent of Civil Service laws and regulations have, to some extent, limited executive discretion over removal, judicial abstention from interference with those acts within the scope of executive discretion has been uniformly affirmed. Thus, the courts have intervened to enforce compliance with specific procedural steps required by law and regulations. *United States* v. *Wickersham*, 201 U. S. 390; *Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.); *Manning* v. *Stevens*, 208 F. 2d 827 (C. A. D. C.); *Money* v. *Anderson*, 208 F. 2d 34 (C. A. D. C.); *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C.); *Deak* v. *Pace*, 185 F. 2d 997 (C. A. D. C.); *Borak* v. *Biddle*, 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Stringer* v. *United States*, 117 C. Cls. 30; *Wittner* v. *United States*, 110 C. Cls. 231; *Elchibegoff* v. *United States*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694. Where, however, appropriate procedural steps have been taken, judicial inquiry into the basis for or propriety of removal has been consistently refused. See cases cited *supra*, pp. 36–37.

Thus, in *Keim* v. *United States*, 177 U. S. 290, where an employee had been discharged as inefficient, this

Court refused to consider the contention that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship," stating (p. 296):

> These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

And even where it is conceded that executive discretion was erroneously exercised, this Court has held that the executive action could not be judicially revised. *Eberlein* v. *United States*, 257 U. S. 82; cf. *Ginn* v. *United States*, 110 C. Cls. 637; *Kellom* v. *United States*, 55 C. Cls. 174. In the *Eberlein* case, plaintiff was removed from office, in accordance with the procedure then in force, on the ground that he had accepted bribes and defrauded the Government. Two years later, the Attorney General reinvestigated plaintiff's record and reported that in his judgment the charges were not sustained. Pursuant to a still further investigation, the President, by Executive Order, restored plaintiff to eligibility for appointment, and plaintiff was subsequently reinstated. Affirming the judgment of the Court of Claims denying

plaintiff recovery of the salary of the office from the date of his removal to the date of his reinstatement, this Court declared (257 U. S. at 84):

> But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts.[21]

If this Court in *Eberlein*, refrained from reviewing executive discretion concededly erroneously exercised, we respectfully submit that *a fortiori* it should not review the exercise of that discretion here, where the discretion conferred to terminate employment "in the interests of the United States" was "absolute," and one cannot say it was erroneously exercised.

---

[21] *Peters* v. *Hobby*, 349 U. S. 331, and *Cole* v. *Young*, 351 U. S. 536, do not represent a departure from the traditional limited scope of judicial inquiry in employee removal cases but are wholly consistent therewith. The invalidation of the removal in *Peters*, *supra*, was based upon the illegality of the Loyalty Review Board's action which, exclusively, underlay Peters' removal. In *Cole* v. *Young*, *supra*, the removal, purportedly effected under the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22-1, was held invalid because of the inapplicability of that Act and because of administrative noncompliance with the procedural requisites of Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U. S. C. 863.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
DONALD B. MACGUINEAS,
JOHN G. LAUGHLIN,
Attorneys.

MARCH, 1957.

APPENDIX

1. Section 103 of Public Law 188 (The State Department Appropriation Act, 1952, 65 Stat. 575, 581), provides as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

2. The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, provide as follows:

390 LOYALTY AND SECURITY OF EMPLOYEES

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal

or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State

(including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved in disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons,

designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standard and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the

authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of

a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian,

Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take

action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional infofmation required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13

417827—57——5

through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, seting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to

the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the Board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the Board shall furnish the officer or employee a notice of the time and place when the Board proposes to consider his case, in order that he, together with his counsel or representa-

tive, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the Board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you shall take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2 (a) (2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in sections 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyalty Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an

administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31. The hearings shall be before a panel of the Loyalty Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyalty Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to

present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will *not* include all material in the file of the case, in that it will *not* include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyalty Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as

possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the

officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall *not* be a part of the written decision and shall in *no* instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Govern-

ment. In such exceptional circumstances, the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board re-

quires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable ground *do not exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds *exist* for belief that the

officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or ployee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *exist* for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *do not exist* for belief that

the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

U. S. GOVERNMENT PRINTING OFFICE: 1951